Supreme Court, U.S.
FILED

951899 MAR 27 1996

OFFICE OF THE CLERK

NO.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JERRY LEE HARVEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

JAMES D. McMASTER
Counsel for Petitioner
JAMES D. McMASTER, P.A.
1217 N. Flagler Drive
West Palm Beach, FL 33401
(407) 832-9600
(407) 832-0091 (fax)

By_____
James D. McMaster
FL Bar No. 220061

80pp

QUESTIONS PRESENTED FOR REVIEW

I) WHETHER THE "REMEDY" PROVISION OF THE SPEEDY TRIAL ACT, 18 U.S.C. § 3162(a)(2) REQUIRES A DISMISSAL WITH PREJUDICE WHERE THERE HAS BEEN A VERY SUBSTANTIAL DELAY OF AT LEAST 301 DAYS OF NON-EXCLUDABLE TIME?

II) WHETHER THE 1988 AMENDMENT TO 18 U.S.C. §3288 (THE SAVINGS STATUTE) WHICH EXPANDED THE STATUTE TO PROVIDE FOR RE-FILING OF INDICTMENTS DISMISSED FOR SPEEDY TRIAL ACT VIOLATIONS, CONSTITUTES AN "EX POST FACTO" LAW WHERE THE STATUTE OF LIMITATIONS FOR THE OFFENSE HAD EXPIRED PRIOR TO THE AMENDMENT OF THE STATUTE AND PRIOR TO THE

RE-FILING OF THE INDICTMENT DISMISSED ON SPEEDY TRIAL GROUNDS?

III) WHETHER THE SERVICE OF TRIAL SUBPOENAS TO WITNESSES IS A PREREQUISITE TO A DETERMINATION THAT SUCH WITNESSES ARE "UNAVAILABLE" FOR TRIAL SUCH AS TO PERMIT THE USE OF THEIR FORMER TESTIMONY PURSUANT TO FEDERAL RULE OF EVIDENCE 804?

IV) WHETHER AN ORAL "PLEA/ COOPERATION" AGREEMENT BETWEEN THE GOVERNMENT AND A CRIMINAL DEFENDANT MUST BE INTERPRETED IN THE DEFENDANT'S FAVOR AS A MATTER OF LAW WHERE THE GOVERNMENT TOTALLY FAILS TO MEMORIALIZE SUCH AGREEMENT?

PARTIES TO THE PROCEEDINGS BELOW

UNITED STATES OF AMERICA
(Plaintiff/Appellee)

Government's Trial Counsel:
Stephen L. Snyder
Assistant United States Attorney

Thomas Fink
Assistant United States Attorney

Government's Appellate Counsel:
Loretta C. Argrett
Assistant Attorney General

Robert E. Lindsay
Alan Hechtkoff
Gregory Victor Davis
Attorneys - Tax Division
U. S. Department of Justice

Kendall Coffey
United States Attorney
Southern District of Florida

JERRY LEE HARVEY
(Defendant/Appellant)

Petitioner's Trial Counsel:
Leonard A. Sands, Esq.

Petitioner's Appellate Counsel:
James D. McMaster

TABLE OF CONTENTS

Page

Questions presented for Review..... i

List of Parties to Proceedings below.. iii

Table of Contents..... iv

Table of Authorities v

Reports of Opinions vii

Statement of Grounds for Jurisdiction. vii

Constitutional Provisions and statutes involved viii

Statement of the Case..... 1

Argument and Authorities..... 10

Appendix ..... -

TABLE OF AUTHORITIES

CASES — PAGE

Akins v. Snow,
922 F.2d 1558 (11th Cir. 1991)..... 23

Collins v. Youngblood,
497 U.S. 37, 110 S.Ct. 2715,
111 L.Ed.2d 30 (1990)..... 23,24

Henderson v. United States,
476 U.S. 321, 106 S.Ct. 1871,
90 L.Ed.2d 299 (1986)..... 15

Martinez v. Sullivan,
881 F.2d 921 (10th Cir. 1989)..... 27

Rowe v. Griffin,
676 F.2d 524 (11th Cir. 1982)..... 29

United States v. Curbello,
940 F.2d 1503 (11th Cir. 1991)..... 27

United States v. Davenport,
935 F.2d 1223 (11th Cir. 1991)..... 15

United States v. Delgado-Miranda,
951 F.2d 1063 (9th Cir. 1991)..... 21

United States v. DeLongchamps,
679 F.2d 217 (11th Cir. 1982)..... 13

United States v. Garber,
607 F.2d 92 (5th Cir. 1979)..... 30

United States v. Garcia,
956 F.2d 41 (4th Cir. 1992)..... 29

United States v. Harris,
942 F.2d 1125 (7th Cir. 1991)..... 30

United States v. Harvey,
651 F.Supp 894 (S.D. Fla. 1986).... 1

United States v. Harvey,
848 F.2d 1547 (11th Cir. 1988)..... 1

United States v. Harvey,
869 F.2d 1439 (11th Cir. 1989)
(en banc).....1,29

United States v. Harvey,
791 F.2d 294 (4th Cir. 1986)..... 29

United States v. Howard,
855 F.2d 832 (11th Cir. 1988)..... 30

United States v. LeQuire,
943 F.2d 1554 (11th Cir. 1991)..... 23

United States v. Miranda,
835 F.2d 830 (11th Cir. 1988)..... 17

United States v. Pena-Carrillo,
46 F.3rd 879 (9th Cir. 1995)..... 21

United States v. Russo,
741 F.2d 1264 (11th Cir. 1984)..... 15,20

United States v. Tapia,
981 F.2d 1194 (11th Cir. 1993)..... 23

United States v. Taylor,
487 U.S. 326, 108 S.Ct. 2413,
101 L.Ed.2d 297 (1988)..... 11

United States v. Vergara,
791 F.Supp 1095 (N.D. W.Va. 1992)... 29

STATUTES

18 U.S.C. § 3162(a)(2)..... 10

18 U.S.C. § 3288 (1988)..... 22

26 U.S.C. § 6531..... 22

OTHER

Fed.R.Evid. 804..... 39

REPORTS OF OPINIONS

The original panel opinion of the Eleventh Circuit was unpublished. The denial of the Petition For Rehearing And Suggestion of Rehearing En Banc is reported at United States v. Harvey, ___ F.3rd _____(11th Cir. 1995).

STATEMENT OF GROUNDS FOR JURISDICTION

This is a Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit following a decision rendered September 1, 1995 affirming a Judgment entered after a jury

trial in a criminal case. The Petition For Rehearing And Suggestion Of Rehearing En Banc was denied on December 29, 1995. The appeal jurisdiction of the Eleventh Circuit was pursuant to Title 28, United States Code, Section 1291. This Court has jurisdiction pursuant to Title 28, United States Code, Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S.C.A. Const. Art. 1, § 9, cl. 3.

No Bill of Attainder or ex post facto Law shall be passed.

Title 18, U.S.C., § 3162(a)(2) Sanctions

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section

3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendre shall constitute a waiver of the right to dismissal under this section.

Title 18, U.S.C., § 3288 (1964)

Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any

statute of limitations.

Title 18, U.S.C., § 3288 (1988)

Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any

statute of limitations. This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.

Fed.R.Evid. 804 Hearsay Exceptions; Declarant Unavailable

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant -

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of

the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the

purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

... (remaining sections inapplicable)

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

In November of 1985 the Petitioner was indicted for various Income Tax Evasion charges (Case number 85-6204-Cr-JCP). In 1986 that case was dismissed with prejudice by the trial court for violations of an oral "plea/cooperation agreement" between the government and the Petitioner. See United States v. Harvey, 651 F.Supp 894 (S.D. Fla. 1986). Said dismissal was originally upheld by a panel of the Eleventh Circuit, United States v. Harvey, 848 F.2d 1547 (11th Cir. 1988), and later reversed (in part) by the court sitting "en banc" and remanded in 1989 for additional proceedings. United States v. Harvey, 869 F.2d 1439 (11th Cir. 1989)(en banc).

On February 13, 1991 the Petitioner

filed a Motion To Dismiss the indictment for violations of the Speedy Trial Act which was denied by the district court on April 29, 1992. On December 21, 1992, the Petitioner renewed his Speedy Trial motion and on December 23, 1992, without a hearing, the trial court granted the motion and dismissed the indictment "without prejudice".

In February of 1993 the Petitioner was re-indicted on the same charges (Case No. 93-6019-Cr-JCP) and the new case proceeded to trial in April of 1993. The Petitioner was convicted of one count of attempting to evade income taxes, and was sentenced to five years imprisonment.

The Petitioner filed an appeal to the Eleventh Circuit, and on September 1, 1995, a panel of the Court issued a "per curiam" opinion affirming the Petitioner's conviction without discussion of the

issues. A Suggestion for Rehearing En Banc was timely filed, which was denied by the Court on December 29, 1995. The instant Petition For Writ of Certiorari followed.

Statement of Facts

The Plea/Cooperation Agreement

By the late 1970's, the Petitioner, an aircraft broker, had accumulated a large sum of money which he had not reported as income and which he had deposited into an offshore bank. Following an arrest in June of 1980, the Petitioner entered into an oral "plea/cooperation" agreement with federal prosecutors in Mobile, Alabama and in South Florida, which agreement was never reduced to writing by the government.

Although the exact terms of the agreement were in dispute, the Petitioner testified that as part of such oral

agreement he was told he would be getting "complete immunity" and that he was getting an "absolutely clean, whitewashed slate just as if he was being reborn". He further testified that as part of said agreement he was required to, and did, disclose the existence of his "offshore" funds to the government, and was told by the government that since they only learned about his "offshore funds" pursuant to the agreement, he would not have to pay taxes on them as long as they remained offshore. The Petitioner admittedly complied with his obligations under the oral agreement to assist the government with its investigations.

Thereafter, the government obtained copies of the bank records relating to the Petitioner's "offshore account" and subsequently indicted the Petitioner for income tax violations relating to his

failure to declare and pay income taxes on the interest income he earned on such funds after entering the agreement. The Petitioner admittedly never disclosed the existence of such funds or any interest earned thereon to the government in the tax returns he filed for the years at issue in this case.

Speedy Trial Act Violations

After the case was remanded to the trial court in May of 1989, the trial court referred the "Kastigar" issue to the Magistrate for hearing. By December 22, 1989, the magistrate had held the hearing and issued her recommendation, the parties had filed their responses, and the matter was ready for decision by the trial court. Between that date and December 23, 1992 (three years later), the date the trial court finally dismissed the indictment for Speedy Trial Act violations, the trial

court still had not ruled on the "Kastigar" matter.

During this three year period, the Petitioner first unsuccessfully sought to have the trial court set a status conference on the case and later, in February of 1991, filed his first Motion To Dismiss for Speedy Trial Act violations. The Government opposed the motion arguing that the entire time the "Kastigar" issue remained under consideration by the trial court was excludable. This position was further argued to the magistrate, who accepted such argument despite defense counsel's arguments that the law was clearly to the contrary. The magistrate's recommendation to deny the motion was affirmed and adopted by the trial court in April of 1992. On December 21, 1992 the Petitioner renewed his Speedy Trial Act

motion, and on December 23, 1992, the trial court, without hearing, entered an Order dismissing the case, without prejudice, for Speedy Trial Act violations, wherein it noted that:

> ... the government's suggestion, made during a hearing held before Magistrate Vitunac on October 22, 1991, that pending motions render all delay "automatically excludable" (DE 147 at 18) is incorrect. (SRDE 188 at 4).

Also in its Order the trial court determined, after a detailed analysis of the various motions filed, that at least 301 days of non-excludable time had elapsed during this period in violation of the Act. The Order went on to remark on the Petitioner's "seemingly obligatory" request that the dismissal be "with prejudice" and then, after reciting the language of the Speedy Trial Act's

provisions regarding the matters to consider in making such decision, the trial court made the following "conclusions":

> The charges of tax evasion against HARVEY are indeed serious. Moreover, the Government has not appeared "lackadaisical" in pursuing the case. See United States v. Taylor, 487 U.S. 326, 337 (1988). Rather, the dismissal was occasioned by circumstances for which the undersigned and both parties must bear some responsibility; neither HARVEY nor the Government has filed a single speedy trial report, in clear disregard of Southern District of Florida General Rule ("Local Rule") 25(B), which requires the filings every twenty days. See Taylor, 487 U.S. at 340 (defendant's culpable conduct affects sanction). Lastly, a prompt reprosecution would not undermine the Speedy Trial Act and would, under the circumstances, serve the interests of justice. The dismissal will be without prejudice.

There was no further explanation or discussion of the three statutory factors

or their effect on the courts's decision, particularly with respect to the effect of the very substantial delay, the failure of the government and court to follow clear precedent, or the effect on the Petitioner's case. The Petitioner's request to have the trial court amend its Order to reflect a dismissal "with prejudice" was denied.

Other Grounds

The trial court denied the Petitioner's motion to dismiss the indictment (and later for Judgment of Acquittal) which was based on the grounds that the oral agreement had to be construed against the government as a "matter of law", and if so construed, rendered his obligation to pay taxes on the offshore funds objectively ambiguous such that a conviction therefore could not stand "as a matter of law". The trial

court further refused the Petitioner's request to utilize prior testimony of two defense witnesses, attorneys who had promised to appear without subpoena but who were unable to appear at trial due to conflicting court schedules.

ARGUMENT AND AUTHORITIES

ISSUE I

THE TRIAL COURT ERRED IN DETERMINING, AND THE APPELLATE COURT ERRED IN REVIEWING, THE CORRECT REMEDY TO APPLY FOR A VIOLATION OF THE SPEEDY TRIAL ACT, I.E., DISMISSAL "WITH" OR "WITHOUT" PREJUDICE.

Title 18, United States Code, Section 3162(A)(2), of the Speedy Trial Act, establishes a framework which guides district court determinations of whether to dismiss with or without prejudice for violations of the Act's provisions, and for appellate court review of such

determinations. As noted by the Supreme Court in United States v. Taylor, 487 U.S. 326, 108 S.Ct.2413, 101 L.Ed.2d 297 (1988);

> [w]here, as here, Congress has declared that a decision will be governed by consideration of particular factors, a district court must carefully consider those factors, as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review. Only then can an appellate court ascertain whether a district court has ignored or slighted a factor that Congress has deemed pertinent to the choice of remedy, thereby failing to act within the limits prescribed by Congress. (emphasis added) Taylor at 336-37.
>
> ...
>
> ... A judgment that

> must be arrived at by considering and applying statutory criteria, however, constitutes the application of law to fact and requires the reviewing court to undertake more substantive scrutiny to ensure that the judgment is supported in terms of the factors identified in the statute. (emphasis added) Taylor at 337.

In the instant case, it is respectfully submitted that the district court failed to follow the dictates of Taylor in that by simply reciting his conclusions in the language of the statutory factors in its Order dismissing the case without prejudice, the trial court failed to "clearly articulate" the effect of all of the various factors required to be considered. As is more fully set forth in the following sections, it is also submitted that the district

court failed to follow the dictates of Taylor and other precedents of the Eleventh Circuit, and thus improperly assessed the various factors required to be considered. Finally, it is further respectfully suggested that the appellate court, by issuing a "per curiam" opinion without discussion of such issues and subsequently denying en banc review, particularly in light of the cases cited herein, failed to undertake the "more substantive scrutiny" required to ensure the judgment is properly supported.

A. THE GOVERNMENT'S AND THE TRIAL COURT'S REPEATED FAILURE TO FOLLOW CLEARLY DEFINED LAW AND PRECEDENT IN THE CALCULATION OF EXCLUDABLE DAYS UNDER THE SPEEDY TRIAL ACT CONSTITUTES A "TRULY NEGLECTFUL ATTITUDE" OR A "PATTERN OF NEGLECT" AND REQUIRES DISMISSAL WITH PREJUDICE WHERE SUCH ACTIONS HAVE CAUSED A VERY SUBSTANTIAL DELAY OF AT LEAST 301 DAYS.

In United States v. DeLongchamps, 679

f.2d 217 (11th Cir. 1982) a case stemming from the very same trial judge involved in the instant matter, the Eleventh Circuit held that the carrying of a motion for a hearing until trial did not toll the time periods under the Speedy Trial Act, pointing to the clear language of the Act which limited the maximum excludable time allowable for any matter taken under advisement by the court to thirty days. After a remand to the trial court resulted in a dismissal "without" prejudice and a subsequent re-indictment and conviction of that defendant, on appeal that court again reversed the judgment and ordered the conviction to be vacated and the indictment dismissed "with prejudice" where the delay was "substantial" (approximately 135 days) and the failure to comply with the Act's clear language was at best "negligent". United States v.

Russo, 741 F.2d 1264 (11th Cir. 1984).

Subsequently, in 1986 the Supreme Court clarified the Act's requirements when a pretrial hearing is held on a motion and all papers are thereafter submitted to the district court for determination, holding that the trial court only has thirty days of excludable time within which to make its ruling. Henderson v. United States, 476 U.S. 321, 106 S.Ct. 1871, 90 L.Ed2d 299 (1986). Further, prior to the district court's denial of the Defendant's motion to dismiss for such a Speedy Trial Act violation, the Eleventh Circuit further clarified the law regarding the calculations of such periods. United States v. Davenport, 935 F.2d 1223 (11th Cir. 1991). Despite such decisions clearly delineating the Act's requirements, the government improperly

maintained, the magistrate accepted and trial court adopted the argument that since the "Kastigar" motion had not yet been decided by the trial judge all time was "excludable" under the act, despite defense counsel's arguments that Henderson clearly allowed only the thirty days. Additionally, as admitted in its Order dismissing the indictment, the trial court further failed to comply with the Act's requirements by failing to contemporaneously detail an "ends of justice" exclusion it entered.

Given the clear requirements of the statute and case law and a previous reversal of this same trial judge for a similar Speedy Trial Act violation, and particularly in view of the correct advice provided by defense counsel which the government and the court ignored, the repeated failure of the government and the

trial court to comply with the Act's requirements constitutes a "truly neglectful attitude" or a "pattern of neglect". Given further the trial court's determination that at least 301 days of non-excludable time elapsed because of such errors, such delay is "very substantial and requires a dismissal "with prejudice.

B) THE TRIAL COURT CANNOT CONSIDER THE DEFENDANT'S COUNSEL'S FAILURE TO FILE SPEEDY TRIAL ACT REPORTS REQUIRED BY A LOCAL RULE AS CONSTITUTING SUFFICIENT "BLAME" OR RESPONSIBILITY FOR THE DELAY AS TO JUSTIFY A DISMISSAL WITHOUT PREJUDICE.

The Eleventh Circuit has previously addressed a situation wherein both the government and a defendant have failed to file speedy trial reports required by a local rule. In that decision, United States v. Miranda, 835 F.2d 830 (11th Cir.

1988), a panel of that court noted:

> Although the local rule speaks of mutual obligation, the scope of responsibility for insuring speedy trials is prescribed by higher authority. Beyond our wariness about disproportionate responsibility borne by any single party, we are bound by constitutional precept and federal statutory intent. The Supreme Court has clearly said, "[a] defendant has no duty to bring himself to trial. Barker v. Wingo, 407 U.W. 514, 527, 92 S.Ct. 2182, 2190, 33 L.Ed.2d 101 (1971). Despite commendable objectives of the local rule, we would contravene the proper allocation were we to graft the burden of notification on appellants in this case. Defendants are not required to insure speediness against themselves.(citations omitted). Miranda at 834.

Given that the only justification given by

the trial court in the instant case for the finding that the Petitioner was in any way responsible for the delay involved was the failure of his counsel to file such speedy trial reports, particularly in view of the common failure of most attorneys to file such reports, it is submitted that the trial court clearly erred in assessing that factor as being sufficient to justify a dismissal "without" prejudice.

C) A DELAY OF <u>AT LEAST</u> 301 DAYS OF NON-EXCLUDABLE TIME IS ENOUGH, BY ITSELF, TO JUSTIFY DISMISSAL WITH PREJUDICE WHERE THE GOVERNMENT'S AND TRIAL COURT'S FAILURE TO COMPLY WITH THE ACT IS <u>AT BEST</u> "NEGLIGENT".

Assuming, arguendo, that, despite clear precedent, the government's improper urging of the trial court to exclude time clearly non-excludable under the Act and the trial court's acceptance of such arguments and its further error in failing

to follow other clear precedent constituted only "negligence", the very "substantial" delay of at least 301 days requires dismissal of the indictment "with prejudice". United States v. Russo, supra at 1268 (if a "substantial" [135 days] violation, a negligent failure to comply with the Act will not suffice to justify retrial).

D) THE TRIAL COURT IS REQUIRED TO HOLD A HEARING WITH THE DEFENDANT ENTITLED TO NOTICE, COUNSEL AND AN OPPORTUNITY TO BE HEARD.

Although the Eleventh Circuit has apparently not addressed this issue, another circuit has held that before the district court can enter a dismissal without prejudice for Speedy Trial Act violations, and thereby permit a defendant's reprosecution, it must hold a hearing, with adequate notice to the

defendant, at which the defendant is entitled to counsel and must be afforded an opportunity to be heard. United States v. Delgado-Miranda, 951 F.2d 1063 (9th Cir. 1991); United States v. Pena-Carrillo, 46 F.3d 879 (9th Cir. 1995). No such hearing was held by the district court in this case and it is respectfully submitted that the rationale of the Ninth Circuit's decisions should be adopted by this Court and such hearings should be required.

ISSUE II

THE 1988 AMENDMENT TO 18 U.S.C. §3288 ("SAVINGS STATUTE") WHICH ALLOWED FOR RE-FILING OF INDICTMENTS DISMISSED FOR SPEEDY TRIAL ACT VIOLATIONS, CONSTITUTES AN "EX POST FACTO" LAW WHEN APPLIED TO A CASE INVOLVING A SPEEDY TRIAL ACT DISMISSAL AND SUBSEQUENT RE-FILING OF THE INDICTMENT WHERE THE STATUTE OF LIMITATIONS FOR THE OFFENSE HAD EXPIRED PRIOR TO THE AMENDMENT OF THE STATUTE AND

PRIOR TO THE REFILING OF THE INDICTMENT.

The one count of the indictment of which the Petitioner was ultimately convicted charged a violation of the income tax laws "on or about April 15, 1982". The applicable law, 26 U.S.C. §6531, provided a six (6) years statute of limitations for such offense. Accordingly, the statute of limitations for such offense expired April 15, 1988.

On November 18, 1988 the "Savings Statute", 18 U.S.C. § 3288 was amended to allow for Speedy Trial Act dismissal reindictments which were not allowed under the former statute. Thereafter, the Petitioner's indictment was dismissed in December of 1992 for a Speedy Trial Act violation, and in February 1993 a new indictment was returned for the 1982 offense.

Although no cases addressing the "Savings Statute" as an ex post facto law could be located, the Eleventh Circuit has held that a change in the laws which disadvantages the offender affected by it can constitute an "ex post facto" law, and the same rationale should apply to the "Savings Statute" in issue. Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991) (denial of annual parole consideration); See also; United States v. LeQuire, 943 F.2d 1554 (11th Cir. 1991)(amendment of RICO statute to add additional predicate acts sections not violate ex post facto where prosecution did not involve the grounds added); United States v. Tapia, 981 F.2d 1194 (11th Cir. 1993)(sentencing under amended guidelines not ex post facto violation where offense continues after guidelines took effect). Likewise, the Supreme Court's decision in Collins v.

Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) does not preclude a determination that the amended Savings Statute applied to the instant facts would constitute an ex post facto violation. As noted therein, a law that abolishes an affirmative defense or changes the matters which might be pleaded as an excuse or justification for the conduct underlying such charge would contravene the ex post facto prohibitions. Collins at 49-50. In the instant situation, the statute of limitations is such a matter which can be raised as an affirmative defense and as an excuse or justification, and thus any change in the law which alters the situation to his disadvantage, which the 1988 amendment did, constitutes an ex post fact law violation.

ISSUE III

THE ISSUANCE AND SERVICE OF TRIAL SUBPOENAS FOR WITNESSES IS NOT A PREREQUISITE TO A DETERMINATION OF THEIR "UNAVAILABILITY" AT TRIAL SO AS TO PRECLUDE THE USE OF THEIR PRIOR TESTIMONY UNDER FED.R.EVID. 804

At trial the Petitioner sought to call as defense witnesses two attorneys, his former defense counsel from Mobile, Alabama, and the former United States Attorney from Mobile, Alabama. Each had previously testified during the "Pre-Kastigar" hearings held in the original case in 1986. Each attorney had agreed to appear at trial to testify for the Petitioner without the necessity of a subpoena, however, when the Petitioner sought their appearances during the trial, each had other court commitments which prevented him from appearing when called. The conflicting court schedules were

brought to the trial court's attention through a letter from one of the attorney's offices and through the representations of Petitioner's trial counsel, and a request was made to utilize their previous testimony. The government opposed the request and contended, among other things, that the Petitioner's failure to subpoena the witnesses precluded a finding of "unavailability". The Petitioner's request to be allowed to utilize their previous testimony was denied by the trial court and the trial ended without the Petitioner being able to present their testimony. Rule 804 of the Federal Rules of Evidence provides that a witness is "unavailable" so as to be able to utilize his prior testimony where the witness is absent from the hearing and the proponent of his statement has been unable to procure his attendance "by process or

other reasonable means". No cases were located by counsel on this particular point, but in Martinez v. Sullivan, 881 F.2d 921 (10th Cir. 1989) that court rejected an argument that the issuance of a subpoena under an interstate compact was a necessary prerequisite to a finding of "unavailability" under a similar statute. See also; United States v. Curbello, 940 F.2d 1503 (11th Cir. 1991)(unavailability of witness not established where government did not represent it had made any request of Bahamian Government to make witness available through extradition or any other means to attend trial). The service of a trial subpoena should not be a prerequisite to a finding of "unavailability" for the purpose of using the witness' prior testimony.

ISSUE IV

DISAGREEMENTS AND AMBIGUITIES IN AN ORAL PLEA/COOPERATION AGREEMENT BETWEEN THE GOVERNMENT AND A CRIMINAL DEFENDANT MUST BE INTERPRETED AGAINST THE GOVERNMENT AS A MATTER OF LAW WHERE THE GOVERNMENT TOTALLY FAILED TO MEMORIALIZE SUCH AGREEMENT.

The Petitioner moved to dismiss the new indictment arguing that because of the terms of his oral agreement with the government, the charges of income tax evasion had to be dismissed as a matter of law. In particular, the Petitioner alleged that he was told by the Government that as part of his oral plea/ cooperation agreement he did not have to pay taxes on the "offshore funds" as long as they remained offshore, and that therefore his obligation to pay such taxes was objectively ambiguous such that a prosecution for their non-payment was barred as a matter of law. I n

situations where such plea/cooperation agreements are not reduced to writing, the government must bear the disadvantage of such ambiguity or omission and they should be resolved in favor of the criminal defendant. United States v. Harvey, 869 F.2d 1439 (11th Cir. 1989)(en banc)(citing Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982); United States v. Vergara, 791 F.Supp 1095 (N.D. W.Va. 1992)(citing United States v. Harvey, 791 F.2d 294 (4th Cir. 1986) and United States v. Garcia, 956 F.2d 41 (4th Cir. 1992). If the Petitioner's agreement with the government is construed as a matter of law in accordance with what he was told by the government, then his obligation to pay taxes on such "offshore funds" is certainly arguably objectively ambiguous and should have been reviewed by the trial court to determine if it was objectively

ambiguous as a "matter of law", and if so, dismissed. United States v. Harris, 942 F.2d 1125 (7th Cir. 1991); See also United States v. Howard, 855 F.2d 832 (11th Cir. 1988)(where facts are undisputed in prosecution for intentionally signing a false tax return, question of whether advances are loans constitutes a question of law for the court); and United States v. Garber, 607 F.2d 92 (5th Cir. 1979)(dissent).

WHEREFORE, Petitioner respectfully requests that this Court issue the Writ Of Certiorari to the lower court.

Respectfully submitted,
Counsel for Petitioner

JAMES D. McMASTER, P.A.
1217 N. Flagler Drive
West Palm Beach, FL 33401
(407) 832-9600
(407) 832-0091 (fax)

By _____
James D. McMaster
FL Bar No. 220061

INDEX TO APPENDIX

1. 11th Circuit Opinion 9/1/95

2. District Court Order Dismissing Case For Violation Of Speedy Trial Act rendered 12/23/92

3. District Court Order denying Post-trial motions rendered 6/23/93

4. District Court Omnibus Order denying Motion To Dismiss rendered 4/19/93

5. 11th Circuit Order denying Petition For Rehearing And Suggestion Of Rehearing En Banc rendered 12/29/95

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-4705
Non-Argument Calendar

D. C. Docket No. 93-6019-CR-JCP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JERRY LEE HARVEY,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(September 1, 1995)

Before COX, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

Jerry Lee Harvey was convicted, following a jury trial, for willfully attempting to evade and defeat personal income tax for the calendar year 1981, in violation of 26 U.S.C. § 7201. He appeals.

Harvey presents four issues on appeal. He contends: (1) that the trial court abused its discretion in dismissing the original indictment for speedy trial violations "without prejudice" rather than with prejudice; (2) that the trial court erred in refusing to dismiss the second ind ctment as having been returned outside the applicable statute of limitations period; (3) that the trial court erred in denying his motion to dismiss and motion for judgment of acquittal because his obligation to pay the income taxes in questions was insufficiently clear to support a criminal prosecution; and (4) that the trial court erred in refusing to

allow him to present the former testimony of two defense witnesses.

We have carefully considered Harvey's arguments in light of the record, and find no error.

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-6204-CR-PAINE

UNITED STATES OF AMERICA

vs.

JERRY LEE HARVEY,

Defendant.

_____/

ORDER DISMISSING CASE FOR VIOLATION OF SPEEDY TRIAL ACT

Background

A. Case History

On November 27, 1985, a grand jury in the Southern District of Florida returned an Indictment charging Defendant, JERRY LEE HARVEY ("HARVEY"), with five counts of income tax evasion for the years 1978 through 1982, in violation of Title 26, United States Code, Section 7201, and one count of filing a false income tax return in April 1981, in violation of Title 26, United States Code, Section 7206(1) (DE 1). Essentially, the Government maintains

that HARVEY failed to report substantial interest income earned on funds deposited in bank accounts in the Cayman Islands and falsely represented that he had no foreign bank accounts.

Adopting a Report and Recommendation by United States Magistrate Judge Ann E. Vitunak (DE 72), the undersigned found that the Government had previously granted both use and transactional immunity to HARVEY, then concluded that the Indictment violated these grants of immunity (DE 82, reported as United States v. Harvey, 651 F. Supp. 894 (S.D. Fla. 1986)). Refusing the Government's request to prove that its evidence was derived from independent sources, the Court dismissed the Indictment against HARVEY.

On appeal, the Eleventh Circuit Court of Appeals initially affirmed the dismissal with prejudice (848 F.2d 1547 (11th Cir. 1988)), granted rehearing en

banc (855 F.2d 1492 (11th Cir. 1988)), then reversed the dismissal of those counts that relate to offenses allegedly committed after the grant of immunity to HARVEY (DE 91, 869 F.2d 1439 (11th Cir. 1989)).

B. Motions To Dismiss

By Order dated April 29, 1992 (DE 176), the undersigned approved and adopted an Order and Report and Recommendation of Magistrate Vitunak (DE 171) that, among other things, recommended denial of Defendant's Motion To Dismiss for Violation of the Speedy Trial Act (DE 124). On May 8, 1992, the case was set for trial during the two-week calendar commencing November 2, 1992 (DE 177). The trial was later continued until December 28, 1992 (DE 185).

On December 21, 1992, seven months after the initial Notice of Calendar Call and Trial and just one week before the

start of trial, HARVEY filed a Renewed Motion To Dismiss for Violation of Speedy Trial Act (the "Renewed Motion") (DE 186), supported by a memorandum of law (DE 187). HARVEY identifies three seperate timeframes, totalling 577 days, that he argues are non-excludable.

Analysis

A. Exclusions under the Speedy Trial Act

Much of the speedy trial dispute concerns the delays occasioned by a number of pretrial motions. The Speedy Trial Act exclusion, 18 U.S.C. § 3161(h), provides:

> The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--
>
> (F) delay resulting from

> any pretrial motion, from the filing of the motion to the conclusion of the hearing on, or other prompt disposition of, such motion;
>
> (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

The Eleventh Circuit Court of Appeals, drawing upon the United States Supreme Court's decision in Henderson v. United States, 476 U.S. 321 (1986), has explained the relationship between sections 3161(h)(1)(F) and 3161(h)(1)(J):

> For pretrial motions that do not require hearings, § 3161(h)(1)(F) excludes the time required for "prompt disposition" of the motion. The length of the exclusion depends upon when the court takes the motion "under advisement" for purposes of § 3161(h)(1)(J). If the court has all the information necessary to rule on the motion at the time the motion is filed, the court immediately has the motion under advisement under § 3161(h)(1)(J) and thirty days may be excluded from the speedy trial clock due to the motion. The court may

establish a period of time after the motion is filed, however, within which parties may submit materials relating to the motion. The motion is not under advisement by the court during this period of time, which is automatically excluded from the speedy trial clock and is not subject to a reasonableness requirement. Once the period for filing additional materials expires, the court takes the motion under advisement for purposes of § 3161(h)(1)(J) and no more than thirty additional days may be excluded from the speedy trial clock.

For motions that require hearings, § 3161(h)(1)(F) excludes all time between the filing of the motion and the conclusion of the hearing at which it is addressed. This entire period is excluded from the speedy trial clock and is not subject to review regarding its reasonableness. Once the hearing is concluded, the motion is treated exactly like a motion for which no hearing is required. If the court has all the materials necessary to rule on the motion, the court is deemed to have taken the motion under advisement immediately following the hearing and § 3161(h)(1)(J) permits no more than thirty additional days to be excluded. As is true for hearings that do not require motions [sic], however, the

> court may provide a period of time following the hearing during which parties may submit supplemental materials regarding the motion. This period of time is automatically excluded without regard to its reasonableness. Once the court concludes the hearing and the time for filing supplemental materials expires, the court has taken the motion under advisement and § 3161(h)(1)(J) permits no more than thirty additional days to be excluded from the speedy trial clock.

United States v. Davenport, 935 F.2d 1223, 1228-29 (11th Cir. 1991) (citations omitted); see also United States v. Mendoza-Cecelia, 963 F.2d 1467, 1476 (11th Cir. 1992).[1]

B. Contested Periods

I. Trial Ready Period
4/29/92 to 11/2/92
(187 days)

In its April 29, 1992 Order Approving

---

[1] Thus, the Government's suggestion, made during a hearing held before Magistrate Vitunak on October 22, 1991, that pending motions render all delay "automatically excludable" (DE 147 at 18) is incorrect.

and Adopting Report and Recommendation of Magistrate (DE 176), the Court wrote:

> This case is apparently ready for trial. It will be assigned a trial date and the time between that date and the date on which it is reached for trial will be excluded for speedy trial purposes.

HARVEY objects to the Court's failure to contemporaneously detail the reasons for an "ends of justice" exclusion, which applies to:

> [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance

> outweigh the best interests of the public and the defendant in a fair trial.

18 U.S.C. § 3161(h)(8)(A). The undersigned acknowledges that its Order did not comply with the technical requirements of the Speedy Trial Act. See Davenport, 935 F.2d 1229. Thus, 180 non-excludable days have expired since April 29, 1992.[2]

The Government might argue that a group of pro se motions filed by HARVEY on December 20, 1991 (DE 151-58), on which the Court has deferred ruling until the conclusion of litigation (DE 171, 176), tolls the speedy trial clock indefinitely. The Eleventh Circuit Court of Appeals has, however, held that "there was no 'delay

---

[2] HARVEY has, during the "trial ready period," filed two pleadings entitled "requests," then not counted them as motions for purposes of this speedy trial calculations. These requests (DE 179, 181) resulted in seven excludable days; June 8-12, 1992 and September 3-4, 1992.

resulting from' the motion when the motion was not decided until after trial commenced." United States v. Khoury, 901 F.2d 948, 971 & N.25 (11th Cir. 1990). Were the rule otherwise, courts could routinely defer pretrial motions for posttrial consideration and thereby subvert the Speedy Trial Act.[3] In short, the December 20, 1991 motions do not affect the "trial ready period."

II. Post-Kastigar Submission
1/22/90 to 2/13/91
(318 days)

On November 30, 1989, Magistrate Vitunak issued a Report and Recommendation finding that the Government had met is burden under Kastigar v. United States, 406 U.S. 441 (1972), of showing that its grand jury and anticipated trial evidence were derived from a source independent of

---

[3] HARVEY could, of course, have avoided the risk of exclusion by withdrawing his motions and refiling them after trial.

HARVEY's own statements (DE 113). HARVEY objected to this portion of the Report and Recommendation (DE 114) and, on December 22, 1990, the Government responded (DE 115). As of this date, the Court has not ruled on the objection.

HARVEY asserts that the speedy trial clock ran from days after the Government's response (January 22, 1990) until his Motion To Dismiss for Violation of the Speedy Trial Act (February 13, 1991).[4] The Court agrees that, once the objections to Magistrate Vitunac's Report and Recommendation were fully briefed,[5] the

---

[4] HARVEY could have further argued that the 10 days between Magistrate Vitunak's Report and Recommendation and his own objection are non-excludable. See United States v. Robinson, 767 F.2d 765, 769 (11th Cir. 1985) (court held, without discussion, that the time prior to a party's objections is non-excludable); but see United States v. Andress, 943 F.2d 622 (6th Cir. 1991) (criticizing Robinson).

[5] The clock would likely stop during the period provided by the Southern District of Florida General Rules for a

matter was "under advisement" for purposes of section 3161(h)(1)(J). See United States v. Andress, 943 F.2d 622, 625 (6th Cir. 1991). Thus, after thirty days, the speedy trial clock began to run. While HARVEY again ignores motions filed in the interim, it appears that 121 non-excludable days expired during the "post-Kastigar submission" period.[6]

Again, the Government might raise an argument regarding the section

---

reply memorandum. See Davenport, 935 F.2d at 1228 (excluding periods of time to submit materials).

[6] Three motions (DE 117-19), the first of which was filed on April 24, 1990, were not heard until October 22, 1991 (DE 137). This entire time is excluded under section 3161(h)(1)(F). Davenport, 935 F.2d at 1228. A request for the scheduling of a Status Conference (DE 116), on which the Court has never ruled, does not require a hearing, and therefore would not justify any exclusion beyond the full briefing period of 45 days. Id. Since the request was ignored, and has since been mooted, however, the Court would not exclude any time beyond the single day of its filing.

3161(h)(1)(F) delay for a hearing. HARVEY filed several motions in 1986, including a Motion to Exclude Evidence on June 2, 1986 (DE 25), that were discussed during a hearing held before Magistrate Vitunac on October 22, 1991 (DE 147), subsequently briefed (DE 162), then decided in the December March 26, 1992 Order and Report and Recommendation (DE 171). The undersigned cannot, in good faith, attribute this lengthy delay to the need for a hearing, particularly since the motion, while mentioned during a hearing, was apparently decided on the pleadings.

III. Immediately Post-Remand
5/12/89 to 7/23/89
(72 days)

Finally, HARVEY contends that the time between the appellate court mandate (DE 91) and the Court's Order Establishing Excludable Time and Directing Clerk to Re-Open Case (DE 98) is non-excludable. He thereby overlooks the pending Kastigar

issue, which was heard on July 14, 1989 (DE 96), August 12-14, 1989 (DE 104-06), and September 12-14, 1989 (DE 99, 102-03). The entire "immediately post-remand" period is therefor excludable under section 3161(h)(1)(F). Davenport, 935 F.2d at 1228.

C. Type of Dismissal

HARVEY includes a seemingly obligatory request that the dismissal be "with prejudice," but cites no authority for this harsh sanction. The Speedy Trial Act provides:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

18 U.S.C. § 3161(a)(2) [sic]

The charges of tax evasion against

HARVEY are indeed serious. Moreover, the Government has not appeared "lackadaisical" in pursuing this case. See United States v. Taylor, 487 U.S. 326, 337 (1988). Rather, the dismissal was occasioned by circumstances for which the undersigned and both parties must bear some responsibility; neither HARVEY nor the Government has filed a single speedy trial report, in clear disregard of Southern District of Florida General Rule ("Local Rule") 25(B), which requires the filings every twenty days. See Taylor, 487 U.S. at 340 (defendant's culpable conduct affects sanction). Lastly, a prompt reprosecution would not undermine the Speedy Trial Act and would, under the circumstances, serve the interests of justice. The dismissal will be without prejudice.

Conclusion

Though HARVEY ignored Local Rule

25(B) and filed his pleading at the eleventh hour, the Court must acknowledge that the Renewed Motion is meritorious. It is therefore ORDERED and ADJUDGED that:

1. Defendant's Renewed Motion To Dismiss for Violation of Speedy Trial Act (the "Motion") (DE 186) is **GRANTED.**

2. The Indictment (DE 1) is **DISMISSED without prejudice.**

DONE and ORDERED at West Palm Beach, Florida, this 23rd day of December, 1992.

James C. Paine
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Leonard A. Sands, Esq.
Thomas L. Fink, AUSA
Steven L. Snyder, AUSA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-6019-Cr-Paine

UNITED STATES OF AMERICA,

v.

JERRY LEE HARVEY,

Defendant,

ORDER

Before the Court is the Motion For Judgment of Acquittal, to Arrest or Set Aside the Judgment, or in the alternative, to Set Aside the Verdict and Grant a New Trial. The defendant's motion, filed April 30, 1993 was supplemented by a memorandum of law supporting the foregoing motion. This supplement was filed May 19, 1993. The government responded to the defendant's motion on June 7, 1993.

Upon consideration of the positions of the parties together with the authorities submitted in support of and in opposition thereto, it is the finding of

the court that the defendant's conviction on only one of the four counts was not inconsistent and, further, that unavailability of the witnesses, Kimbroogh and Haas, which might have justified the reading of their testimony given in a prior proceeding, was not established.

It is, therefore,

ORDERED and ADJUDGED that the defendant's Motion for Judgment of Acquittal, Motion for Arrest of Judgment, or in the alternative, Motion for a New Trial be and the same is hereby denied.

DONE and ORDERED at West Palm Beach, Florida this 23rd day of June, 1993.

James C. Paine
United States District Judge

cc: Leonard A. Sands, Esq.
Jeffrey R. Levenson, AUSA
Thomas L. Fink, AUSA
Steven L. Snyder, AUSA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-6019-CR-PAINE

UNITED STATES OF AMERICA

vs.

JERRY LEE HARVEY,

Defendant.

_____/

OMNIBUS ORDER

Background

In June 1980, a grand jury sitting in the Southern District of Alabama indicted JERRY LEE HARVEY ("HARVEY") and several others for attempting to import quaalude tablets. As the case against him was considered a "slam dunk," HARVEY decided to cooperate with the Government. The United States Attorney for the Southern District of Alabama offered to dismiss the pending indictment in return for HARVEY's cooperation with an investigation being conducted by the United States Attorney

for the Southern District of Florida. Pursuant to this unwritten offer, HARVEY disclosed his illegal activities in the drug trade to Drug Enforcement Administration ("DEA") agents. He also divulged financial information with respect to the illegal drug deals, including the identification of funds in a Cayman Islands bank. HARVEY apparently met his side of the bargain, as the United States Attorney dismissed the Alabama indictment against him.

On November 27, 1985, a grand jury sitting in the Southern District of Florida indicted HARVEY for five counts of income tax evasion and one count of filing a false tax return (Case No. 85-6204, DE 1). The Government alleged that HARVEY kept millions of dollars in the Cayman Islands bank, yet failed to report interest income in the tax years 1978-82 and denied that he held any overseas bank

accounts in the tax year 1980. Pretrial pleadings indicated that the parties disputed the terms of their 1980 cooperation agreement. Following a "pre-Kastigar hearing" before Magistrate Vitunac, the Court found that HARVEY agreed to disclose his drug activities and cooperate with the South Florida investigation in return for dismissal of the Alabama indictment and an informal grant of use and transactional immunity. United States v. Harvey, 651 F. Supp. 894 (S.D. Fla. 1986). The Court, holding that "information regarding his finances as related to his drug deals including particulars related to his income should also be included in the immunity," dismissed the indictment with prejudice.

The Government appealed the dismissal of those counts charging violations after the grant of immunity. The Eleventh Circuit Court of Appeals originally

affirmed, 848 F.2d 1547 (11th Cir. 1988), then granted rehearing en banc, 855 F.2d 1492 (11th Cir. 1988), and reversed, 869 F.2d 1439 (11th Cir. 1989). The Court held that HARVEY's 1980 disclosure to the DEA did not immunize him from future tax crimes. "[E]ach failure to report income and each failure to disclose the Cayman Islands account was a seperate transaction, in the eyes of the law separable from the transactions for which Harvey received immunity." 869 F.2d at 1448. So long as the Government could build its tax case on evidence derived from a legitimate source independent of the immunized testimony, it could prosecute HARVEY. On remand, Magistrate Vitunac held a full Kastigar hearing, then issued a Report and Recommendation finding that the Government had met its burden of proof (DE 113).

The 1985 indictment was ultimately

dismissed without prejudice for a speedy trial violation (DE 188). ON February 3, 1993, another grand jury indicted HARVEY for (i) failing to report income interest earned during the tax year 1980, (ii) failing to report income interest earned during the tax year 1981, (iii) failing to report income interest earned during the tax year 1982, and (iv) filing a return for the tax year 1980 that falsely claims that he held no overseas bank account (Case No. 93-6019, DE 1). The Court has ordered that "[a]ll pleadings from Case No. 85-6204-CR-PAINE shall be considered a part of the above-captioned file for all purposes, including any appeal."

Analysis

1. Objections to Report and Recommendation (DE 113-15).

In her Report and Recommendation regarding Kastigar, Magistrate Vitunac wrote:

It is this Court's belief that the Government violated the terms of the bargain it struck with Harvey (whether called transactional immunity or a bargain) when it put before the indicting grand jury the criminal events about which Harvey told the debriefing agents, and used those events as the likely source of income for his tax evasion in later years. Respectfully, this Court does not believe that the Government is precluded, by its bargain, to prosecute Harvey for tax evasion which occurred after the tax year in which the bargain was struck; only that the Government is precluded from putting before the grand jury or the trial jury the fact that the likely source of the income is from drug activity which preceded 1980. That conclusion protects both the Government's interest in being able to prosecute future crimes, and Harvey's interest in receiving the benefit of the bargain he struck with the Government. This Court believes that the present indictment should be dismissed without prejudice for the Government to re-indict without the use of the evidence of Harvey's criminal activities which include and precede the Mobile arrest.

A fair reading of U.S. v. Harvey, at 848 F.2d 1552 (11th Cir. 1988) however, leads this Court to the conclusion that the

> Appellate Court took into consideration the fact that Harvey's Mobile conduct and pre-Mobile conduct were presented to the indicting grand jury when reaching its decision to reverse the dismissal. Because U.S. v. Harvey, at 869 F.2d 1439 (11th Cir. 1988), represents the law of this case, this Court is bound to direct its proceedings in accordance with that opinion.
>
> With respect to the Kastigar issue as it relates to use immunity, this Court finds by the preponderance of the evidence that the Government met its burden of showing that all of its trial evidence and the evidence it presented to the grand jury were not the product of Jerry Harvey's statements or derived from Jerry Harvey's statements. The Government has affirmatively shown that each piece of evidence it intends to use against Harvey does not violate the dictates of Kastigar. The Government has proved an independent source for each and every piece of evidence it intends to use at trial and for each and every piece of evidence it presented to the grand jury. See U.S. v. Byrd, 765 F.2d 1524 (11th Cir 1985).

(DE 113 at 3-4) (sic).

Not surprisingly, HARVEY endorsed Magistrate Vitunac's comment that she

would dismiss the indictment because the grand jury heard about pre-1980 activity, but objected to her finding that the Government had fully satisfied Kastigar (DE 114). Upon a de novo review, the undersigned agrees with Magistrate Vitunac that (i) when the Eleventh Circuit reversed the dismissal and remanded for further proceedings, it was well aware that Assistant United States Attorney Stephen L. Snyder "told the grand jury that the probable source of Harvey's income was his drug-related activities," 869 F.2d at 1443, and (ii) the Government met its burden of proof under Kastigar. The Report and Recommendation will be adopted.

2. Motion to Disclose, or for in Camera Inspection of, Grand Jury Proceedings

HARVEY recently filed the above-referenced motion, again arguing that an indicting grand jury should not hear any

facts, regardless of source, concerning his pre-1980 activities. For the reasons already discussed, this motion will be denied.

3. Motion To Dismiss Indictment

Just one week before the start of trial, HARVEY filed a Motion to Dismiss Indictment, claiming that the Government included a third promise in its 1980 agreement: "to forego forfeiture of, or collection of federal income taxes on, monies the Defendant had previously deposited in off-shore bank accounts, including foregoing any collection of federal income taxes on any interest income earned on said off-shore monies as long as such monies remained 'off-shore.'"[7]

Since 1986, the Government, HARVEY, a

---

[7] Although directed to the "Indictment," the motion seemingly addresses only Counts I, II, and III, the income tax evasion charges. Harvey does not argument that the agreement affects Count IV, the false statement charge.

United States Magistrate Judge, a United States District Judge, and the Eleventh Circuit Court of Appeals have considered the terms and effect of the 1980 cooperation agreement. Magistrate Vitunac held a lengthy pre-Kastigar hearing at which both HARVEY and Thomas M. Haas, his lawyer in 1980, testified as to their understanding of the agreement. After the Magistrate recommended, and the undersigned ruled, that the indictment should be dismissed, the Eleventh Circuit Court of Appeals specifically held that the agreement, as HARVEY had described it, did not bar a prosecution for subsequent tax crimes. As recently as 1991, HARVEY moved for "an Order enforcing his 1980 co-operation agreement and plea bargain with the Government." (DE 128). Yet nowhere in the record can the Court find, nor has HARVEY identified, any mention of a separate agreement to forego collection of

federal income taxes, which would seemingly preclude the tax evasion charges. See Sansone v. United States, 380 U.S. 343, 351 (1965) (government must prove that tax is owed). The undersigned declines to dismiss the indictment as a matter of law on this basis.

Conclusion

It is hereby ORDERED and ADJUDGED that:

1. The Report and Recommendation (DE 113) is ADOPTED.

2. HARVEY's Motion to Disclose, or for in Camera Inspection of, Grand Jury Proceedings is DENIED.

3.HARVEY's Motion To Dismiss Indictment is DENIED.

DONE and ORDERED in West Palm Beach, Florida, this 19th day of April, 1993.

James C. Paine
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-4705

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JERRY LEE HARVEY,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: COX, DUBINA and BARKETT, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

(?) R. Cox
UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 29 1995
MIGUEL J. CORTEZ
CLERK